

FILED

Superior Court of California
County of San Francisco

JUL 21 2022

CLERK OF THE COURT

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Deputy Clerk

SUPERIOR COURT OF CALIFORNIA

COUNTY OF SAN FRANCISCO

DEPARTMENT 613

MICHAEL LANGFORD,

Plaintiff,

v.

MONSANTO COMPANY, a corporation;
WILBUR-ELLIS COMPANY, LLC, WILBUR-
ELLIS NUTRITION, LLC, AND DOES 1
through 100 inclusive

Defendants.

Case No. CGC-21-592238

ORDER GRANTING PLAINTIFF'S
MOTION FOR PREFERENTIAL TRIAL
SETTING

INTRODUCTION

This matter came on regularly for hearing on July 20, 2022, in Department 613, the Honorable Andrew Y.S. Cheng, presiding. Jennifer Moore, Elizabeth Graham, Brent Wisner, and Tudor Farcas appeared for Plaintiff Michael Langford ("Plaintiff"). Sandra Edwards appeared for defendants Monsanto Company and Wilbur-Ellis Company LLC and Wilbur-Ellis Nutrition LLC (collectively "Defendants").

1 Having considered the arguments, authorities, and pleadings of the parties, the Court GRANTS
2 Plaintiff's motion for preferential trial setting.

3 **BACKGROUND**

4 On June 15, 2021, Plaintiff filed a complaint against Defendants alleging strict liability – design
5 defect and failure to warn, negligence, fraud, breach of express and implied warranties, and exemplary
6 damages. Plaintiff contends that Roundup®, a glyphosate-based herbicide allegedly made, marketed, or
7 distributed by the Defendants, was a “defective and unreasonably dangerous product,” and that his
8 exposure to it caused him personal injuries, including non-Hodgkin lymphoma, mental and physical pain,
9 emotional distress, and economic loss. (Compl., ¶ 17.) Plaintiff alleges that Monsanto knowingly
10 misrepresented the safety of its glyphosate-based herbicides, including Roundup®, and the risks they
11 posed to human health – including a risk of causing cancer. (*Id.* at ¶¶ 7–8.)

12 Plaintiff regularly sprayed Roundup® on his property in Northern California between 1985 and
13 2019 to control weeds and insects. (*Id.* at ¶ 40.) He purchased Roundup® from Granite Bay Ace
14 Hardware. (*Ibid.*) Plaintiff also alleges exposure to Roundup® in his capacity as a building inspector
15 supervising large construction projects in Northern California. (*Ibid.*)

16 Plaintiff was diagnosed with non-Hodgkin's lymphoma (“NHL”) in 2007, and has since had five
17 recurrences, multiple rounds of chemotherapy, and a stem cell transplant. (MPA at 2.) After a blackout
18 episode on January 1, 2020, which left him hospitalized, Plaintiff has suffered from worsening memory
19 loss. (*Ibid.*) At 72 years old, he also suffers from progressive neuropathy in his arms and legs, which
20 severely impacts his balance, ability to walk, and ability to conduct his daily business. (*Ibid.*) Plaintiff has
21 lost the ability to live independently and needs assistance. (*Ibid.*)

22 On June 16, 2022, Plaintiff moved for an order granting a trial preference under Code of Civil
23 Procedure section 36, subdivision (a).

24 **LEGAL STANDARD**

25 California Code of Civil Procedure § 36 provides, in relevant part:

26 (a) A party to a civil action who is over 70 years of age may petition the court for a
preference, which the court shall grant if the court makes both of the following findings:

(1) The party has a substantial interest in the action as a whole.

1 (2) The health of the party is such that a preference is necessary to prevent prejudicing the
2 party's interest in the litigation.

3 ...

4 (c) Unless the court otherwise orders:

5 ...

6 (2) At any time during the pendency of the action, a party who reaches 70 years of age may
7 file and serve a motion for preference.

8 (d) In its discretion, the court may also grant a motion for preference that is accompanied
9 by clear and convincing medical documentation that concludes that one of the parties
10 suffers from an illness or condition raising substantial medical doubt of survival of that
11 party beyond six months, and that satisfies the court that the interests of justice will be
12 served by granting the preference.

13 (e) Notwithstanding any other provision of law, the court may in its discretion grant a
14 motion for preference that is supported by a showing that satisfies the court that the
15 interests of justice will be served by granting this preference.

16 (f) Upon the granting of such a motion for preference, the court shall set the matter for trial
17 not more than 120 days from that date and there shall be no continuance beyond 120 days
18 from the granting of the motion for preference except for physical disability of a party or a
19 party's attorney, or upon a showing of good cause stated in the record. Any continuance
20 shall be for no more than 15 days and no more than one continuance for physical disability
21 may be granted to any party.

22 (Code of Civ. Proc., § 36(a), (c)(2), (d)–(f).)

23 “An affidavit submitted in support of a motion for preference under subdivision (a) of Section 36
24 may be signed by the attorney for the party seeking preference based upon information and belief as to the
25 medical diagnosis and prognosis of any party. The affidavit is not admissible for any purpose other than a
26 motion for preference under subdivision (a) of Section 36.” (*Id.*, § 36.5.)

“There can be little argument that section 36 was enacted for the purpose of assuring that an aged
or terminally ill plaintiff would be able to participate in the trial of his or her case and be able to realize
redress upon the claim asserted. Such a preference is not only necessary to assure a party's peace of mind
that he or she will live to see a particular dispute brought to resolution but it can also have substantive

1 consequences. The party's presence and ability to testify in person and/or assist counsel may be critical to
2 success. In addition, the nature of the ultimate recovery can be adversely affected by a plaintiff's death
3 prior to judgment." (*Looney v. Super. Ct.* (1993) 16 Cal.App.4th 521, 532.)

4 DISCUSSION AND ANALYSIS

5 Plaintiff moves for trial preference pursuant to California Rules of Court rule 3.1335 and Code of
6 Civil Procedure section 36, subdivision (a). Plaintiff seeks a preference trial set for September 1, 2022
7 because he is over 70 years of age and has a substantial interest in this case because of his diagnosis of
8 non-Hodgkin's lymphoma. Plaintiff further contends that his advanced age, Non-Hodgkin's Lymphoma
9 with five recurrences, worsening neuropathy, progressive memory loss, and health issues support the
10 granting of trial preference.

11 Code of Civil Procedure § 36(a) sets forth three elements for an individual to be entitled to trial
12 preference: (1) The individual must be over 70 years of age; (2) The individual must have a substantial
13 interest in the action as a whole; and (3) The health of the individual must be such that a preference is
14 necessary to prevent prejudicing the party's interest in the litigation. Only the third factor is disputed.

15 The Court of Appeal applied Code of Civil Procedure § 36(a) in *Fox v. Superior Court* (2018) 21
16 Cal.App.5th 529. In *Fox*, the plaintiff's attorney submitted a declaration describing plaintiff's stage IV
17 lung cancer and related ailments and opined that "it is imperative that the trial be held as soon as possible"
18 for plaintiff "to effectively participate and assist in her trial, so that her interests will not be prejudiced[.]"
19 (*Fox*, 21 Cal.App.5th at 532.) The Court of Appeal reasoned:

20 [O]n this record we see no genuine dispute that Ms. Fox is very sick. It is uncontroverted
21 she suffers from stage IV lung cancer and severe coronary artery disease, among other
22 ailments. She is undergoing chemotherapy treatment, but is in constant discomfort and has
23 difficulty performing basic life functions. And critically, her mental state has deteriorated
24 to a point where she becomes confused and forgetful. All told, the evidence shows that
25 while Ms. Fox is currently able to participate in a trial, she has good reason for concern
that will not be the case for much longer as her health deteriorates. In the face of this
uncontroverted showing, we think it was error to deny her preference on the trial calendar.
... Beyond the proof the Foxes offered, we are hard pressed to see what more they would
need to present to justify entitlement to calendar preference under subdivision (a). For

1 those in Ms. Fox’s unfortunate situation, the end may come quickly with little warning;
2 years may pass with gradual, relentless decline before the battle is lost; or, happily, there
3 may be sustained remission after episodic periods of improvement and relapse. Anyone
4 who has ever heard a physician say in these circumstances, ‘we just can’t predict with any
5 certainty,’ will appreciate that indeterminacy is not only inherent in the situation, but is
6 part of the challenge of dealing with it. We therefore agree that, on this record, the absence
7 of more specifics about Ms. Fox’s prognosis was insufficient to deny the Foxes’ request
8 for calendar preference.

9 (*Id.* at 535–36.)

10 Defendants argue that Plaintiff has not met his evidentiary burden because he has not established
11 that a preferential trial setting is necessary due to his health and has offered no medical evidence
12 supporting his claims of progressive memory loss or dementia. (*Opp.* at 5, 7–9.) The Court disagrees.

13 Where a motion for preference is based on terminal illness of a party, clear and convincing
14 medical documentation of the party’s health is required; however, this high burden does not apply to a
15 motion made under Code of Civil Procedure section 36, subdivision (a). (*Fox, supra*, 21 Cal.App.5th at
16 534–535.) Moreover, the “evidentiary burden is much less when preference is based on CCP § 36(a)
17 (party over age 70). It is sufficient for the moving party’s *attorney* to state a medical diagnosis based on
18 information and belief (CCP § 36.5, *see* ¶ 12:247). Such declarations are clearly *not* enough for a
19 preference under § 36(d); i.e., admissible *medical* testimony is required.” (Weil & Brown, Cal. Prac.
20 Guide Civ. Pro. Before Trial (The Rutter Group 2022) ¶ 12:251.1 [emphasis in original].) Plaintiff has
21 sufficiently carried his burden. (Decl. of Michael Langford ISO Plaintiff’s Motion for Preferential Setting,
22 ¶¶ 3–17; Decl. of M. Elizabeth Graham ISO Plaintiff’s Motion for Preferential Setting, ¶¶ 3–4, Exs. A–B;
23 *Fox, supra*, 21 Cal.App.5th at 535 [“good reason for concern” that plaintiff’s health deterioration will
24 prejudice plaintiff at trial].)

25 “It is true that courts have long recognized that the Legislature intended section 36 to be
26 mandatory in circumstances that appear to be present here. (§ 36, subs. (a) & (f) [court “*shall* set the
matter for trial” (italics added) where party to civil action is over 70, has substantial interest in action, and
preference is necessary because of party’s health]; *Fox v. Superior Court* (2018) 21 Cal.App.5th 529, 535,

1 230 Cal.Rptr.3d 493 [“preference must be granted” where party meets standard and “[n]o weighing of
2 interests is involved”]; *Miller v. Superior Court* (1990) 221 Cal.App.3d 1200, 1204, 270 Cal.Rptr. 766
3 [statute “grants a mandatory and absolute right to trial preference”]; *Swaithe v. Superior Court* (1989)
4 212 Cal.App.3d 1082, 1085, 261 Cal.Rptr. 41 [trial court “has no power to balance the differing interests
5 of opposing litigants in applying the provision”]; *Koch-Ash v. Superior Court* (1986) 180 Cal.App.3d 689,
6 694, 225 Cal.Rptr. 657 [§ 36 “must be deemed to be mandatory and absolute” and “no discretion is left to
7 trial courts”]; *Rice v. Superior Court* (1982) 136 Cal.App.3d 81, 86–87, 185 Cal.Rptr. 853.]” (*Isaak v.*
8 *Super. Ct.* (2022) 73 Cal.App.5th 792, 799.)

9 While Plaintiff’s cancer currently is in remission, Plaintiff has other health conditions including
10 memory loss, cognitive impairment, chemotherapy-induced neuropathy, urinary urgency, and gait
11 difficulty as assessed by his doctor in March 2022, which supports granting his motion for trial
12 preference. (*Isaak, supra*, 73 Cal.App.5th at 795 [preference motion granted under Code of Civil
13 Procedure section 36(a) where plaintiff has Parkinson’s disease, is wheelchair-bound, receives palliative
14 care, and “suffers physical and mental impairments including foggiess of thought, weakness, fatigue,
15 loss of appetite, incontinence, and the inability to walk, conditions that have unfortunately worsened since
16 his diagnosis”]; Langford Decl., ¶¶ 3–17; Graham Decl., ¶¶ 3-4, Exs. A–B; Decl. of Sarah Langford
17 Stephenson ISO Plaintiff’s Motion for Preferential Trial Setting, ¶¶ 3–8; Decl. of M. Elizabeth Graham
18 ISO Plaintiff’s Reply ISO of His Motion for Preferential Setting, Ex. C at 002280.)

19 Based on this evidence, the Court finds that preference is necessary to prevent prejudicing
20 Plaintiff’s interest in the litigation. (*See* Code of Civ. Proc., § 36, subd. (a), par. (2).)

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22 ///

23 ///

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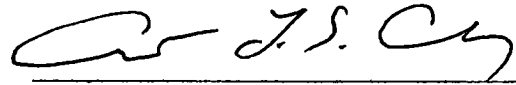
1 **CONCLUSION**

2 The Court **GRANTS** Plaintiff's motion for preferential trial setting.

3 Trial is set for **November 7, 2022**. Because this Court will be in trial on another matter until
4 November 18, 2022, the Court assigns the case back to Department 206 for assignment to a civil trial
5 judge.

6
7 **IT IS SO ORDERED.**

8
9 Dated: July 21, 2022



10 **ANDREW Y.S. CHENG**
11 Judge of the Superior Court

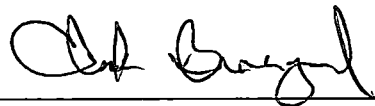
CERTIFICATE OF ELECTRONIC SERVICE
(CCP 1010.6(6) & CRC 2.251)

I, CLARK BANAYAD, a Deputy Clerk of the Superior Court of the County of San Francisco, certify that I am not a party to the within action.

On July 21, 2022, I electronically served the ATTACHED DOCUMENT(S) via File&ServeXpress on the recipients designated on the Transaction Receipt located on the File&ServeXpress website.

Dated: July 21, 2022

T. Michael Yuen, Clerk

By: 

CLARK BANAYAD, Deputy Clerk